National Energy Board | Office national de l'énergie

Reasons for Decision

Canadian Association of Petroleum Producers

GHW-R-1-2007

December 2007

Review of GHW-1-2007 Decision

Canada

National Energy Board

Reasons for Decision

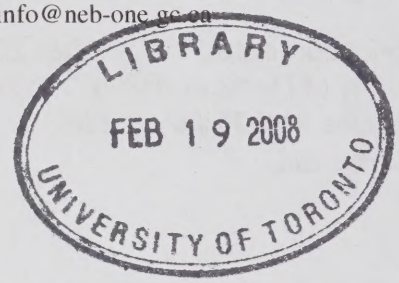
In the Matter of

Canadian Association of Petroleum Producers

Application dated 11 October 2007 for a Review of Decision GHW-1-2007 regarding Facilities and Toll Methodology on Alliance Pipeline Ltd.

GHW-R-1-2007

December 2007



Cat No. NE22-1/2008-3E
ISBN 978-0-662-47629-0

This report is published separately in both official languages. This publication is available upon request in multiple formats.

Copies are available on request from:
The Publications Office
National Energy Board
444 Seventh Avenue S.W.
Calgary, Alberta, T2P 0X8
E-Mail: publications@neb-one.gc.ca
Fax: 403-292-5576
Phone: 403-299-3562
1-800-899-1265

For pick-up at the NEB office:
Library
Ground Floor

Printed in Canada

N° de cat. NE22-1/2008-3F
ISBN 978-0-662-07958-3

Ce rapport est publié séparément dans les deux langues officielles. On peut obtenir cette publication sur supports multiples, sur demande.

Demandes d'exemplaires :
Bureau des publications
Office national de l'énergie
444, Septième Avenue S.-O.
Calgary (Alberta) T2P 0X8
Courrier électronique : publications@neb-one.gc.ca
Fax : 403-292-5576
Téléphone : 403-299-3562
1-800-899-1265

Des exemplaires sont également disponibles à la bibliothèque de l'Office
(rez-de-chaussée)

Imprimé au Canada

Table of Contents

List of Figures

Abbreviations

10^3m^3	thousand cubic metres
Act or NEB Act	*National Energy Board Act*
Alliance	Alliance Pipeline Ltd.
BCX	British Columbia Expansion
Board or NEB	National Energy Board
CAPP	Canadian Association of Petroleum Producers
FT	firm transportation
IRs	information requests
Mcf	thousand cubic feet
MMcf/d	million cubic feet per day
MW	megawatts
PRPC	Primary Receipt Point Capacity
PRPD	Primary Receipt Point Designation
ROS	Receipt Only Service
Rules	*National Energy Board Rules of Practice and Procedure, 1995*
TAC	Taylor-Aitken Creek
TSA	Transportation Service Agreement

Chapter 1

Introduction

On 28 February 2007, Alliance Pipeline Ltd. (Alliance) filed an application seeking authorization under Parts III and IV of the *National Energy Board Act* in respect of its British Columbia Expansion project. Pursuant to section 58 of the Act, Alliance applied for approval to construct a new 5.7 MW compressor station at its existing Taylor Junction valve and pig trap in northeastern BC. The new compressor station would provide additional receipt capability for the Taylor-Aitken Creek (TAC) zone of the Alliance Pipeline. Figure 1-1 is a map identifying the location of the Project and the TAC zone.

Pursuant to Part IV of the Act, Alliance applied for certain amendments to its Transportation Tariff, which would introduce Receipt-Only Service (ROS) with respect to the incremental capacity from the TAC zone arising from the installation of the new compressor station. ROS is available to any shipper that is a party to a firm transportation (FT) contract with Alliance and that has subscribed to ROS. Since the ROS does not include transportation service, an ROS shipper must contract with an existing Alliance FT Shipper or use its own FT contracts. The expansion would increase firm receipt capacity from the TAC zone by 4.25 million cubic metres per day (150 million cubic feet per day (MMcf/d)) and non-firm capacity by 566 thousand cubic metres per day (20 MMcf/d). Alliance also proposed a ROS Secondary Receipt Point Toll to help facilitate the "continued high use of the available ROS capacity".

The Board solicited comments from interested persons regarding the process which should be used to examine the application and subsequently established a written proceeding providing for information requests (IRs), the filing of evidence and argument. The Canadian Association of Petroleum Producers (CAPP) asked IRs, and filed evidence and argument. Letters of comment, IRs and argument were received from other parties as well.

The Board issued its Reasons for Decision GHW-1-2007 on 11 September 2007 regarding the Alliance application.

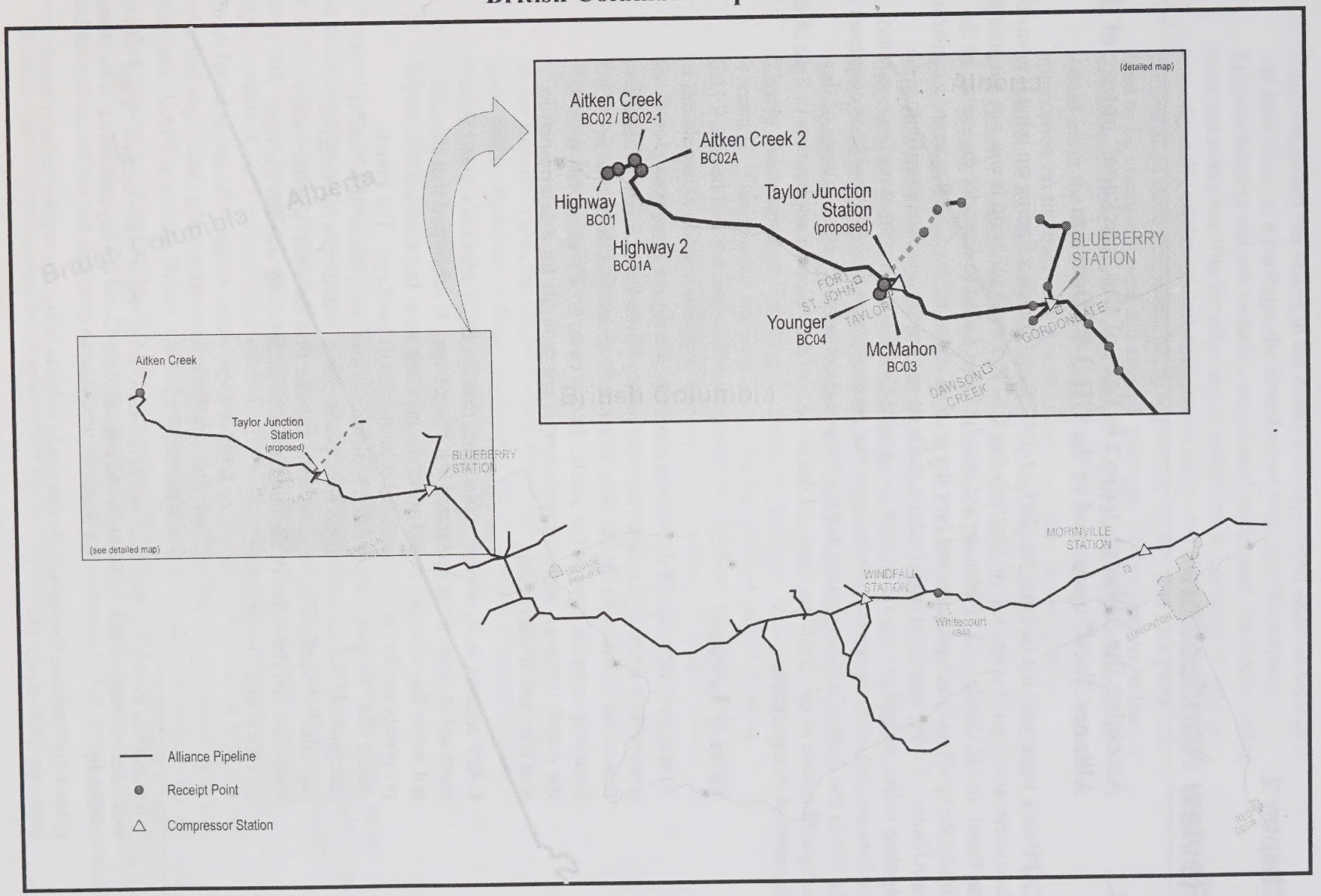
On 11 October 2007, CAPP filed an application pursuant to subsection 21(1) of the Act and section 44 of the *National Energy Board Rules of Practice and Procedure, 1995* (Rules) requesting an order granting a review of the GHW-1-2007 Decision and issuing directions on the procedure for determining the merits of overturning the Decision. CAPP maintained that the Board committed errors that raise doubt as to the correctness of the Decision. CAPP also filed an application pursuant to subsection 47(1) of the Rules requesting a stay of the GHW-1-2007 Decision pending the Board's determination of the review application.

In a letter dated 8 November 2007, the Board solicited comments on whether the stay should be granted. Letters in support of CAPP's stay application were filed by: Devon Canada Corporation; EnCana Corporation; Canadian Natural Resources; Nexen Marketing; Pioneer Natural Resources Canada; and Talisman Energy Inc. Union Gas Limited filed a letter indicating that it had no submissions but wished to be copied on all correspondence.

Alliance filed its response to the application for a stay on 21 November 2007 and CAPP filed its reply comments on 26 November 2007.

In its application for a review, CAPP submitted eight grounds which it argued raise a doubt as to the correctness of the Board's Decision. Having considered CAPP's application, the Board has reached the following decisions as set out in the following chapter, where each of the grounds for review is discussed.

Figure 1-1
British Columbia Expansion



Chapter 2

Review Application

2.1 Assessing the Alliance project in light of the "package" nature of the Alliance Tariff approved in the GH-3-97 Decision

CAPP took issue with the fact that the GHW-1-2007 Panel[1] made a finding on what it terms the "commercial founding compact" on the basis that CAPP specifically said it was not a matter that the Panel should decide. CAPP also argued that the Panel failed to consider the nature of the "integrated package" as a package and how the reasons advanced by CAPP warrant a constraint on Alliance. CAPP noted that such package deals do not become ordinary tariffs that the pipeline is free to apply to amend without constraint; CAPP submitted that parties enter into settlements and other agreements on the basis that respect for an agreed to package continues for the life of the deal. CAPP suggested that the Panel did not consider the evidence of the integrated nature of the Tariff package and did not assess the Alliance application in light of the elements of that package.

Views of the Board

Although CAPP argued that a determination of whether there was a commercial founding compact was unnecessary, the Panel heard evidence that no such compact existed. The Panel determined that there was no founding compact beyond the Tariff. In this case, CAPP disagrees with the Panel; however, mere disagreement is not grounds for a determination that a review is warranted.

CAPP argued, in its review application, that the BCX application had to be assessed in light of the integrated Tariff package. It submitted that this did not mean that Alliance could never do anything new, but that new proposals needed to be consistent with the Tariff package. The Panel stated that "the proposed service is different from what exists now" and it recognized "that arrangements were put in place to underpin the original facilities".[2] Both of these statements indicate that the Panel did take into consideration the terms of the current Tariff in deciding whether the new service should be approved.

---

1 In this decision, the GHW-1-2007 Panel will be referred to as the "Panel" while the term "Board" will be used when referring to either the Members who considered the review and stay applications or the Board generically.

2 GHW-1-2007 Alliance Pipeline Ltd. Facilities and Toll Methodology Reasons for Decision, dated September 2007, at page 11.

While the Board has stated in the context of negotiated settlements that it will treat them as a package, the Board notes first, that the original Alliance hearing did not include a negotiated settlement. Secondly, while there are many benefits for allowing a settlement to continue as long as was originally contemplated, this cannot mean that the settlement can bind the Board's future decisions, or, as argued by CAPP, that new proposals need to be consistent with the original package. If this were to be true, it would be an error of law for the Board to approve any settlement, as it would fetter the Board's discretion. If the Board were to refuse to hear an application on the basis that a settlement is in place, it would be an abdication of the Board's jurisdiction and the Board could be subject to an application of *mandamus* to force it to hear the application. If the Board were to hear an application but determine that it could not change the terms of the package, this could result in the Board finding that it must enforce tolls that are no longer just and reasonable, which would be an error of law. Further, an interpretation that the Board can only approve new proposals that are consistent with the original package would frustrate the application of the Act, in that it would render section 21 meaningless.

Clearly, settlements or "packages" can be re-examined if circumstances warrant it. This is what the Panel found in the GHW-1-2007 Decision. CAPP argued that the Board should assess the Alliance application in light of the elements of the package in the GH-3-97 hearing. As stated above, the Panel recognized the arrangements in relation to the original facilities and noted the difference in the service as applied for from what currently exists. To the extent that it needed to do so, the Panel did what CAPP argued it should have done.

In the Board's view, the GHW-1-2007 Panel did address its mind to this issue and no doubt as to the correctness of the Decision has been raised on this ground.

2.2 Open Season

CAPP argued that the Panel failed to apply the Board's own statutory criteria that there be no unjust discrimination to the open season and the two contracts that were negotiated following the close of the open season.[3] Further, CAPP alleges that the Panel, in fact, abdicated the Board's statutory duty on the basis that open seasons operate in accordance with commercial law principles. While CAPP acknowledged that the Panel required a new open season, it argued that the Panel failed to put all shippers on an equal footing in that the two shippers with whom Alliance had negotiated agreements continued to enjoy the "discriminatory fruits" of those negotiations. CAPP noted the Board's broad powers outlined in subsection 12(2) of the Act and argued that the correct thing for the Panel to do was to consider fully the objections to the open season. CAPP stated that, when the Panel determined that a second open season was required, it should have directed that all shippers would have an equal opportunity to bid in that open season,

3 Contracts with Chevron Canada Resources and PPM Energy Canada Ltd.

which CAPP alleges would have required putting the two shippers who had originally acquired capacity on equal footing with all other shippers in that second open season.

Views of the Board

CAPP argued that the Panel should have considered fully the objections to the open season. As is clear from the Decision, the Panel did that. It found that the communication was poor and ordered a second open season to be conducted.

The shippers' subscriptions for the new service were only upheld to the extent that there was no further interest as a result of the second open season that the Panel ordered. If there had been further interest as a result of that second open season, Alliance would have had to bring the matter back to the Board. There is no evidence that allowing the two shippers to rely on the original open season occasioned any prejudice or harm to any other shipper. There is no evidence that, if new shippers had come forward, they would have been on any different footing than the original two shippers. CAPP has not brought forward evidence that there has been any unjust discrimination, only an allegation that there was something wrong with the process when the Panel ordered the second open season.

CAPP submitted that the Board had "washed its hands" of supervision of the open season. Clearly, this is not the case as the Panel ordered that a second open season be conducted to ensure that there was proper consultation with shippers. However, the Board is of the view that, unless it is necessary in the circumstances, it would not be in industry's best interest for the Board to dictate the terms and processes for open seasons, given that, as the Panel noted, an open season is a commercial process. Further, the Board notes that there are other remedies in the Act such as section 71, as noted in the Decision[4], for parties who are in need of service on a gas pipeline or the no unjust discrimination provisions in section 67, if discrimination can be shown to have occurred.

The Board is of the view that it is clear that the Panel considered CAPP's objections to the open season as it ordered a new one. Further, there is no evidence that the process in the second open season resulted in any discrimination or prejudice. No doubt as to the correctness of the Decision has been raised on this ground.

4 GHW-1-2007 at page 13

2.3 Contracts

CAPP argued that the Panel committed an error in that it failed to consider the evidence that what it referred to as two "long-term contracts" supporting the need and economic feasibility for the project were for an entirely different project from what the Panel approved.

Views of the Board

The Panel found that there was a need for additional receipt capacity in the TAC zone. This finding was based on supply and design capacities. The mention of the long-term contracts by the Panel was a subsidiary noting. However, the Board notes that the two shippers who signed the two long-term contracts filed letters of comment in the GHW-1-2007 hearing indicating that they had subscribed to the Project. In this regard, the Board is of the view that the statement that the facilities are supported by long-term contracts was supported by the evidence.

The Board would also point out that reasons must be read in their entirety. The statement about the contracts should not be taken out of context. As was stated in the RH-R-1-2002 Decision:

> While it is always possible to allege errors when individual elements are taken out of context, doing so does not call the correctness of the decision into question. The Decision must be examined in its entirety.[5]

The Board finds no error on the basis of this submission.

2.4 Preapproval of the New Service

CAPP argued that, because Alliance was designated a Group 1 Pipeline in Decision GH-3-97, it is expected to apply for new services and related toll methodology before offering the new service and because it did not follow this procedure, the Panel should have dismissed Alliance's application. CAPP cited a passage of the recent Keystone Decision[6] as support for its proposition.

Views of the Board

CAPP did not refer to any policy document, Board decision or direction from the Board setting out the requirement for a Group 1 company to apply for new services before offering them to shippers. Open seasons or service offerings through task force committees or other means are often

5 RH-R-1-2002 TransCanada PipeLines Limited Review of RH-4-2001 Cost of Capital Decision, dated February 2003, at page 3.

6 OH-1-2007 TransCanada Keystone Pipeline GP Ltd. Application for Construction and Operation of the Keystone Pipeline, dated September 2007.

held before the company applies for approval of the service. This enables the company to gauge whether there is interest in the new service and what the issues are that the company needs to address.

If companies were required to come to the Board before it was determined whether there was any interest in a service, it would delay the business process and impose considerable regulatory burden on all parties. Clearly, a pipeline cannot place a new service in operation without either Board approval or the filing of a tariff pursuant to paragraph 60(1)(a) of the Act, but the Board expects a company to determine whether there is an interest in, need for or concerns with the service before it attempts to place them in operation. The Board has no interest in, and does not believe it would be in industry's best interests for it to micro-manage service offerings.

The reference in the OH-1-2007 Reasons for Decision does not indicate that Board approval is required before new services are offered, but instead discusses the benefits of the market knowing the terms and conditions of access in advance of contract negotiations. The Panel, in the GHW-1-2007 Decision, confirmed this requirement by ordering a new open season. There is no doubt as to the correctness of the Decision on this ground.

2.5 Primary Receipt Point Capacity to Aggregate Firm Transportation Capacity Ratio

CAPP stated that the Panel misconstrued Article 6 of the Alliance FT Service Toll Schedule and failed to recognize that ROS creates free-standing primary receipt point capacity (PRPC) entitlements in addition to the balance of PRPC entitlements to transportation capacity contemplated in the Tariff package negotiated when Alliance was created. While CAPP acknowledged that the 2003 change to the Tariff agreed to by shippers allowed flexibility within the overall balance of Primary Receipt Point Designation (PRPD)[7] to total transportation capacity, it submitted that no change was made to the rule that the total PRPC entitlements must remain in balance with total transportation capacity. Referring to the wording of Article 6, CAPP submitted that the correct finding was that, while individual firm transportation shippers can increase their PRPD above the 125% factor by taking an allocation from another shipper, the overall rule remains unaffected. According to CAPP, ROS violates the rule by creating PRPC over and above the 125% factor.

Views of the Board

The Panel, in the GHW-1-2007 Decision, discussed both CAPP's and Alliance's views on this matter and concurred with Alliance's explanation that the ROS proposal will not change the PRPD restriction of 125% of individual shipper's contracted capacity. Further, the Board notes that

7 PRPD refers to the designation by a shipper of Primary Receipt Point Capacity which then creates the firm right to put gas onto the system at the designated point up to the designated volume.

Article 6 of the FT Service Toll Schedule, (dealing with PRPD) has not been amended. Therefore, even if the addition of ROS could potentially affect a shipper's balance of PRPD to aggregate firm contractible transportation capacity, the provisions of the Tariff prevail.

The Board is not persuaded that a doubt has been raised regarding the correctness of the Decision on this ground.

2.6 Fuel Costs

CAPP argued that the Panel misconstrued the evidence with respect to this issue. In CAPP's view, ROS customers do not share the fuel cost associated with the new service as the ROS customers do not pay any fuel costs. In this regard, CAPP suggested that the Panel failed to consider the fundamental principle of a cost-based toll methodology that costs are allocated in relation to cost causation. CAPP also suggested that the Panel erred in failing to consider that Alliance's own cost allocation principle was based on cost neutrality to transportation service customers to the new ROS and that the result of charging no fuel to ROS customers is not cost neutral to transportation customers. CAPP submitted that the Panel ought to have disallowed Alliance's proposal to charge fuel only to the transportation customers and to direct that the cost of the incremental fuel be charged to ROS customers.

Views of the Board

The Board is not persuaded that the GHW-1-2007 Panel misconstrued the evidence or that it found that the ROS shippers pay fuel costs as part of the ROS service alone. An equally valid reading of the statement in the Decision that "compressor fuel is a cost which is appropriately shared by all shippers" [8] is that all shippers on the system should pay the fuel costs. The ROS shippers are firm transportation shippers on the system; therefore, they pay the fuel costs as part of their long-haul transportation service.

CAPP referred to a previous Board decision which found that a particular service was a separate and distinct service and therefore there should be incremental costs for it. In the Board's view, this is not relevant, as the Panel in this case addressed its mind to the question of who should pay the costs and found that the costs should be rolled in. In making this decision, the Panel noted that the increase in fuel costs is within the range of changes in fuel that arise on the system. Further, it found that there are some potential offsetting benefits to shippers.

In the Board's view, no doubt as to the correctness of the Decision has been raised on this ground.

---

8 GHW-1-2007 at page 19

2.7 ROS Secondary Receipt Toll

CAPP claimed that the Panel ignored or failed to understand the evidence that the secondary receipt service toll was set at a level intended to affect prices of transactions in the unregulated secondary market and failed to connect the evidence to the issue of economic feasibility. According to CAPP, the Panel failed to consider the implications for the unregulated secondary market, if this approach to toll methodology was allowed. CAPP argued that the Panel either misunderstood or ignored the market distorting effects and the power to influence unregulated prices that was being given to two shippers when it approved the secondary receipt toll. CAPP submitted that the Panel failed to consider the Board's own prior precedents and the fact that no precedent existed for what Alliance proposed. CAPP also argued that the Panel failed to consider the evidence that actual TAC utilization data did not support the 1.5 times toll level. While CAPP acknowledged that the Board has allowed an existing pipeline suffering erosion of its firm contracts to value price above the cost-based level to prevent migration from firm to interruptible service, CAPP submitted that the Board has not allowed a pipeline to add capacity that would not be economic on the basis of the primary toll and there was no precedent for designing a toll methodology to fit two individual shippers' economics.

Views of the Board

Virtually every toll decision that the Board makes influences the secondary market. Simply because the Decision **influences** the secondary market, does not mean that it **inhibits** the secondary market as alleged by CAPP. CAPP did not provide evidence or argument which would demonstrate that this is the case. The Panel made findings on economic feasibility. Simply because the Panel did not accept CAPP's arguments and CAPP disagrees with the Panel's findings of fact on various matters does not mean that the Panel made an error in this regard.

The fact that there are no regulatory precedents for a specific toll design is not grounds to doubt the correctness of the Decision. Using this logic, new and innovative services and toll methodologies could never be implemented. As the Board is not bound by precedent, there can be no error if the Board fails to address in its Reasons the absence of precedent for the toll design or fails to apply previous decisions which CAPP argued should be relied upon.

The Panel did not make an explicit finding that the 15 cent/Mcf ($\$5.30/10^3m^3$) toll is based on the 100% load factor ROS demand charge divided by Alliance's anticipated 66.67% utilization factor. It was not required to do so. However, it gave reasons for approving the toll at a level of 1.5 times the ROS toll and found that the proposed Secondary Receipt Services toll was just and reasonable.

In the Board's view, no doubt as to the correctness of the Decision has been raised on this ground.

2.8 Fairness of the Process

CAPP argued that it would have not filed the evidence that it filed had it known that Alliance had no subscriptions to the open season. It characterized this information as late-breaking information that Alliance revealed after CAPP had filed its Written Evidence and filed its responses to Alliance IRs. CAPP submitted that it made it clear that the entire process beginning with the open season was tainted with unfairness and denial of natural justice and that the Panel did not address this issue in the Decision. CAPP argued that the Panel should have dismissed the application.

CAPP suggested that the Panel's statements that CAPP supported the TAC II project (the project that was the subject of the original open season) and the Panel's use of this supposed support to find in Alliance's favour were inappropriate, as CAPP's support was plainly conditional on the existence of a successful binding open season with two accepted subscriptions. CAPP claimed that the condition was voided with the later disclosure by Alliance that the open season had not been successful. CAPP submitted that this misuse of CAPP's evidence, in a context of a failure to appreciate the unfairness in the overall proceeding, contributes an additional factor to the denial of natural justice.

Views of the Board

CAPP suggested that it did not know that that the open season did not result in subscriptions until late in the process. However, the Board notes that although the project changed after the open season, the interest expressed in the open season was from those parties who subscribed to the ROS service. Further, although CAPP stated that this was late-breaking information, CAPP's evidence in the GHW-1-2007 proceeding was that Alliance revealed the concept and details of the ROS service to its wider shipper community at a 26 January 2007 meeting[9].

CAPP argued that the Panel set a compressed schedule for a written proceeding and that its request for a technical conference, an oral hearing, and a later request for more time to prepare information requests and for the Panel to establish an issues list were all denied.

The Panel solicited comments from parties on the process to be used in examining the Alliance application. Some parties requested a written hearing while CAPP requested an oral hearing with a technical conference. There is no right to an oral hearing or a technical conference, and this alone cannot be grounds to raise a doubt as to the correctness of the Decision. The Board further notes that, with Alliance's agreement, CAPP sent two rounds of IRs to Alliance.

With respect to the statement that CAPP requested that the Panel prepare a list of issues, what CAPP actually said in its letter requesting a delay for

9 GHW-1-2007 at page 12

submitting IRs was that "a one-week delay in the process for IRs would also allow interveners and Alliance to identify the relevant issues and so assist the Panel in the expeditious hearing of this application." In any event, not establishing a list of issues does not make the process unfair.

The Board agrees that the statements regarding CAPP's support of the TAC II project were perhaps unnecessary. However, these statements were not the foundation for any of the Panel's decisions and are therefore not grounds for a review of the Decision.

The Board is of the view that the process provided CAPP with sufficient opportunity to understand the evidence of the applicant and present its case. The Board finds that there is no merit in conducting a review on this ground.

Chapter 3

Disposition

Having considered each of the elements raised by CAPP, the Board is of the view that CAPP has not raised a doubt as to the correctness of the GHW-1-2007 Decision.

Having found that no doubt has been raised as to the correctness of the Board's GHW-1-2007 Decision, and therefore having denied the application for review, the Board need not render a decision regarding the stay application.

CAPP's applications to review and stay the Board's GHW-1-2007 Alliance BC Expansion Project Decision are denied.

J.S. Bulger
Presiding Member

K. Bateman
Member

S. Crowfoot
Member

Calgary, Alberta
December 2007